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Will I.N.S. v. Cardoza-Fonseca Affect the Ninth Circuit Court of Appeal's Review of Asylum and Withholding of Deportation Cases

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Will *I.N.S. v. Cardoza-Fonseca* Affect the Ninth Circuit Court of Appeal's Review of Asylum and Withholding of Deportation Cases?

The legislative, or supreme authority, cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice, and decide the rights of the subject by promulgated standing laws, and known authorized judges. For the law of nature being unwritten, and so nowhere to be found but in the minds of men, they who through passion or interest shall miscite or misapply it, cannot so easily be convinced of their mistake where there is no established judge.¹

John Locke

I. INTRODUCTION

Intent upon living an unshackled life, Europeans living under the oppression of sixteenth and seventeenth century sovereigns migrated to North America. Unrestricted immigration continued through the late nineteenth century; and the early twentieth century brought new waves of European immigration. This unique immigrant heritage causes many Americans² to think of the United States as a haven for refugees. While a popular sense of compassion for those fleeing persecution is integral to the American self-image, United States refugee law and policy in the latter half of the twentieth century has been xenophobic and unpredictable. With this in mind, Congress passed the Refugee Act of 1980.³

This Comment will initially summarize United States post-World War II refugee legislation in order to place the Refugee Act of 1980 in an historical context. The Refugee Act was an attempt by the legislature to remedy the ad hoc nature of American refugee policy

1. J. LOCKE, OF CIVIL GOVERNMENT 112-13 (1968).

2. For purposes of this Comment, the words "America" and "American" refer to the United States and all individuals within the United State's borders.

3. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.); ("[T]he Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands") 8 U.S.C. § 1521 (1982).

and codify the United States' historical commitment to aid refugees.⁴ Congress sought to accomplish this by incorporating the United Nations' definition of a refugee into the United States' statutory law. This refugee definition was intended to provide the benchmark for uniform refugee admittance.⁵

The success and potential of the Refugee Act will then be analyzed in the context of the Ninth Circuit Court of Appeals' post-1980 case law concerning political asylum and withholding of deportation. This exposition and analysis will demonstrate the inconsistency within the Ninth Circuit's interpretation of the Refugee Act with regard to the requirements of the United Nations' refugee definition.⁶ In reviewing this issue, it is important to ask what role should the courts take to insure the success of the Refugee Act's implementation? Did the United States Supreme Court's recent pronouncement on the Refugee Act of 1980, *I.N.S. v. Cardoza-Fonseca*,⁷ resolve or perpetuate this inconsistency? These questions will be examined in light of traditional administrative law notions of delegation.

II. UNITED STATES POST-WAR REFUGEE LEGISLATION

A. *The Displaced Persons Act of 1948*

In 1948, Congress passed the Displaced Persons Act which was the first post-war statutory attempt to provide specific relief to refugees.⁸ The Displaced Persons Act⁹ was a direct response to the refugee problem created by World War II.¹⁰

To qualify under the 1948 Act as a "displaced person," a person must have been from a prescribed geographic region and must not have been resettled by January 1, 1948.¹¹ The displaced person also

4. *Id.*; see also *infra* notes 47-66 and accompanying text.

5. See *infra* text accompanying notes 47-66.

6. See *infra* text accompanying notes 67-160.

7. 107 S. Ct. 1207 (1987).

8. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (repealed 1952).

9. The Displaced Persons Act adopted the International Refugee Organization's (IRO) definition of a displaced person. Displaced Persons Act of 1948, Pub. L. No. 80-774, § 2(b), 62 Stat. 1009, 1009 (repealed 1952).

10. Displaced Persons Act of 1948, Pub. L. No. 80-774, § 2(c)-(d), 62 Stat. 1009, 1009-10 (repealed 1952). For example, one category of displaced persons were people who fled Nazi persecution in Germany or Austria and had not firmly resettled in either of those countries by January 1, 1948. *Id.*

11. *Id.* Congress required displaced persons to satisfy regular immigration admissions standards in order to exclude Communists and other political undesirables. SENATE COMM. ON THE JUDICIARY, 96TH CONG., 1ST SESS., REVIEW OF U.S. REFUGEE RESETTLEMENT

had to give assurances to the Displaced Person Commission that, if admitted, he or she would not become a public charge.¹²

The 1948 Act had a separate standard for those who were residing in the United States prior to April, 1948. This group could apply to the United States Attorney General for adjustment of immigration status. If the Attorney General approved adjustment of immigration status, he was required to report to Congress "all the facts and circumstances of the case" that led to this conclusion.¹³ Congress had to first pass a concurrent resolution before the Attorney General could adjust immigration status.¹⁴ The Attorney General was required to deport displaced persons if Congress failed to pass such a resolution.¹⁵ This procedure allowed the Attorney General considerable latitude in screening applicants while Congress acted in a semi-judicial capacity by reviewing adjustment claims.¹⁶

B. The Refugee Relief Act of 1953

The Refugee Relief Act of 1953 was a response to refugee-escapees.¹⁷ This Act's distinction between refugees from Communist and non-Communist regions evidenced the marriage between immigration and cold war foreign policy.¹⁸ The 1953 Act created specific quotas for refugee-escapees, and delineated specific regions from which they

PROGRAMS AND POLICIES 28 (Comm. Print 1979) [hereinafter REFUGEE RESETTLEMENT PROGRAMS].

12. Displaced Persons Act of 1948, Pub. L. No. 80-774, § 2(c)(3), 62 Stat. 1009, 1009-10 (repealed 1952). This included not taking the jobs of Americans. Displaced persons were additionally required to show the commission they would be able to receive safe and sanitary housing without displacing others. *Id.*

13. Displaced Persons Act of 1948, Pub. L. No. 80-774, § 4, 62 Stat. 1009, 1011 (repealed 1952).

14. *Id.*

15. *Id.*

16. There is no separation of powers problem with this arrangement because concurrent resolutions only require bicameralism and not presentment to the Executive. BLACK'S LAW DICTIONARY 1474 (4th ed. 1968); *cf.* I.N.S. v. Chadha, 462 U.S. 919 (1983) (White, J., dissenting) (one house legislative veto held unconstitutional because both bicameralism and presentment were absent).

17. Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400 (expired Dec. 31, 1956). " 'Refugee' means any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural calamity or military operations is out of his usual place of abode and unable to return thereto" Refugee Relief Act of 1953, Pub. L. No. 83-203, § 2(a), 67 Stat. 400, 400 (expired Dec. 31, 1956). " 'Escapee' means any refugee who, because of persecution or fear of persecution on account of race, religion, or political opinion, fled from the Union of Soviet Socialist Republics or other Communist, Communist dominated or Communist-occupied area of Europe" *Id.* § 2(b).

18. *Id.*

could apply.¹⁹

The Refugee Relief Act was similar to the Displaced Person Act in that both required the Attorney General to make an initial determination on adjustment of status by reporting pertinent facts to Congress.²⁰ Congress had to then grant permanent residence status by concurrent resolution before the Attorney General was authorized to adjust an alien's immigration status.²¹

C. *The 1952 Immigration and Nationality Act*

The year before the Refugee Relief Act, Congress comprehensively amended the Immigration and Nationality Act (INA).²² The 1952 Act contained two provisions that were to have a substantial impact on refugees: section 243(h) (withholding of deportation)²³ and section 212(d)(5) (parole).²⁴ Withholding of deportation was both strict and discretionary. In order to qualify under section 243(h), an alien had to demonstrate that he or she had been subject to physical

19. Refugee Relief Act of 1953, Pub. L. No. 83-203, § 4, 67 Stat. 400, 401 (expired Dec. 31, 1956). Unlike the Displaced Persons Act, refugee-escapees did not have their numerical admissions allocations charged against general immigration quotas. *Id.* Those present in the United States, who qualified under the statute's language, could apply for adjustment of immigration status. Refugee Relief Act of 1953, Pub. L. No. 83-203, § 6, 67 Stat. 400, 403 (expired Dec. 31, 1956).

20. Displaced Persons Act of 1948, Pub. L. No. 80-774, § 4, 62 Stat. 1009, 1011 (repealed 1952); Refugee Relief Act of 1953, Pub. L. No. 83-203, § 6, 67 Stat. 400, 403 (expired Dec. 31, 1956).

21. Displaced Persons Act of 1948, Pub. L. No. 80-774, § 4, 62 Stat. 1009, 1011 (repealed 1952); Refugee Relief Act of 1953, Pub. L. No. 83-203, § 6, 67 Stat. 400, 403 (expired Dec. 31, 1956). In 1957 Congress passed the Refugee-Escapee Act. Immigration and Nationality (Refugee-Escapee) Act amendments, Pub. L. No. 85-316, 71 Stat. 639 (1957) (amending Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952)). This Act was substantially similar to the Refugee Relief Act in its definition of refugee-escapees and served the same practical purpose. *Id.*

22. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1557 (1982)).

23. Immigration and Nationality Act, Pub. L. No. 82-414, § 243(h), 66 Stat. 163, 214 (1952) (codified as amended at 8 U.S.C. § 1253(h) (1982)). While all prior legislation was ad hoc and of limited duration, one could argue that section 243(h) of the 1952 Act created the first permanent base for refugee admissions. This argument is not strictly true because withholding deportation only allowed one to stay in the United States until conditions in the foreign country changed. The temporary nature of withholding deportation equally applies to parole. Aliens admitted under either parole or withholding of deportation could potentially adjust their immigration status. Immigration and Nationality Act, Pub. L. No. 82-414, §§ 212(d)(5), 243(h), 66 Stat. 163, 188, 214 (1952) (codified as amended at 8 U.S.C. §§ 1182(d)(5), 1253(h) (1982)).

24. Immigration and Nationality Act, Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (1952) (codified as amended at 8 U.S.C. § 1182(d)(5) (1982)).

persecution.²⁵ Despite a showing of physical persecution, however, granting withholding of deportation was still in the Attorney General's discretion.²⁶ An alien's right to remain in the United States under withholding of deportation only lasted until the threat of physical persecution had subsided.²⁷

The Attorney General was also given discretion over the parole standard, as well as implementation and possible revocation of parole.²⁸ He was authorized to parole any alien into the United States in emergencies or "for reasons strictly in the public interest."²⁹ Parole was "designed to overcome . . . the stringent entry requirements contained in the INA without allowing the alien the legal protections granted with formal entry into the United States."³⁰ Parole was viewed as a temporary measure.³¹

Though initially designed for the benefit of individuals, parole was used for mass admissions of Hungarians in 1956.³² This development made Congress concerned about the "unfettered and unmonitored use of parole for refugee admissions by the Executive."³³ Congress, nonetheless, continued to tolerate and, at times, endorse this application of mass parole.³⁴

As evidenced by contrasting the strict standard applied to Chinese refugees with the liberal standard applied to Hungarians, the At-

25. Immigration and Nationality Act, Pub. L. No. 82-414, § 243(h), 66 Stat. 163, 214 (1952) (codified as amended at 8 U.S.C. § 1253(h) (1982)). The subsequent 1965 amendment changed the withholding of deportation provisions to read "persecution on account of race, religion, or political opinion" instead of the physical persecution standard in the 1952 Act. Immigration and Nationality (Refugee-Escapee) Act amendments, Pub. L. No. 89-235, § 11(f), 79 Stat. 911, 918 (1965) (codified as amended at 8 U.S.C. § 1253(h) (1982)).

26. Immigration and Nationality Act, Pub. L. No. 82-414, § 243(h), 66 Stat. 163, 214 (1952) (codified as amended at 8 U.S.C. § 1253(h) (1982)) (The withholding of deportation is now mandatory upon a showing of the requisite elements. 8 U.S.C. § 1253(h)(1) (1982)).

27. *Id.*

28. Immigration and Nationality Act, Pub. L. No. 82-414, § 212(d)(5), 66 Stat. 163, 188 (1952) (codified as amended at 8 U.S.C. § 1182(d)(5) (1982)).

29. *Id.*

30. Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9, 15 (1981) [hereinafter Anker & Posner, *The Forty Year Crisis*].

31. Refugee Resettlement Programs, *supra* note 11, at 29.

32. *Id.* at 30. See also *id.* at 10; S. REP. NO. 256, 96th Cong., 1st Sess. 6 (1979).

33. Anker & Posner, *The Forty Year Crisis*, *supra* note 30, at 16 n.27.

34. Refugee (Fair Share) Act, Pub. L. No. 86-648, 74 Stat. 504 (1960) (codified as amended in scattered sections of 8 U.S.C.). The Fair Share Act was an official grant of parole power to the Attorney General to parole refugee-escapees into the United States. *Id.* "The Fair Share Law was criticized for its discrimination against certain groups of refugees and for its failure to establish by permanent statute a refugee admission procedure." Anker & Posner, *The Forty Year Crisis*, *supra* note 30, at 16.

torney General used parole to advance United States foreign policy objectives.³⁵ Reflecting on past uses of the parole authority, Attorney General Griffin Bell commented:

I am not comfortable about the use of the parole authority in situations where I have exercised that authority in the past. Nor is this discomfort unique to me. Every Attorney General before me . . . has voiced similar reservations because the intent of Congress, in establishing the parole authority, was to provide a safety valve for unusual, *individual cases* of compelling need that could not otherwise be met. It was not to provide the means to end-run the other provisions of the immigration law.³⁶

The Ford administration and members of Congress found reliance on parole an "[un]desirable means of formulating U.S. refugee policy . . . and agreed not to authorize additional parole programs until legislation establishing new, systematic refugee admission procedures was enacted."³⁷

D. *The 1965 Amendment to the Immigration and Nationality Act*

The Immigration and Nationality Act was again amended in 1965.³⁸ The 1965 amendment created the first permanent statutory basis for refugee admittance under section 203(a)(7) (conditional entries).³⁹ Conditional entries could come from a wider geographic area than in the 1948 and 1953 Acts.⁴⁰ Section 203(a)(7), sometimes referred to as the "seventh preference,"⁴¹ was available to aliens apply-

35. Anker & Posner, *The Forty Year Crisis*, *supra* note 30, at 20 n.49. The parole standard was completely amorphous: the Attorney General was given discretion to model a subjectively appropriate standard for each situation where parole authority was exercised. *Id.*

36. REFUGEE RESETTLEMENT PROGRAMS, *supra* note 11, at 9 (emphasis added).

37. *Id.* at 11.

38. Immigration and Nationality Act amendments, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.).

39. Immigration and Nationality Act amendments, Pub. L. No. 89-236, § 3, 79 Stat. 911, 912-13 (1965) (codified as amended at 8 U.S.C. § 1153 (1982)). This section was limited to the Eastern Hemisphere which severely restricted its application beyond Communist dominated Eastern European regions. *Id.*

40. Conditional entrants under section 203(a)(7) could also come from the Middle East. The Middle East was considered to be boarded by Pakistan on the east, Libya on the west, Turkey on the north and Saudi Arabia and Ethiopia on the south. *Id.*; *cf. supra* notes 10 and 17.

41. Immigration and Nationality Act amendments, Pub. L. No. 89-236, § 3, 79 Stat. 911, 912-13 (1965) (codified as amended at 8 U.S.C. § 1153 (1982)). Section 203(a)(7) was termed the "seventh preference" because section 203(a) had nine categories, each ranked in a hierarchy of immigration preferences. *Id.*

ing from Communist or Communist-dominated countries if an Immigration and Naturalization Service officer determined that:

[(i)] because of persecution or fear of persecution on account of race, religion, or political opinion they have fled (I) from any Communist or Communist-dominated country or area, or (II) from any country within the general area of the Middle East, and (ii) are unable or unwilling to return to such country or area on account of race, religion, or political opinion⁴²

The seventh preference was modified in 1976 to include the Western Hemisphere.⁴³ This broad-sounding expansion was of little practical importance because Cubans were the only group permitted entry under the terms of section 203(a)(7). A problem arose due to an insufficient number of visas for Eastern Hemisphere applicants. Meanwhile the visas allocated to the Western Hemisphere went largely unused because few applicants from nations of the Western Hemisphere Countries could meet the definition of "refugee" in section 203(a)(7).⁴⁴ In 1978, the Western and Eastern Hemisphere quotas were merged, creating one international ceiling of 17,400.⁴⁵ Even after the East-West wall in 203(a)(7) collapsed, the admissions criteria remained unchanged.⁴⁶

E. The United Nations Protocol Relating to the Status of Refugees and the Refugee Act of 1980

In 1968, the United States ratified the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol).⁴⁷ The Protocol

42. *Id.* In both the 1948 and 1953 Acts, and under section 203, the Attorney General was required to report to Congress complete and detailed facts of each Refugee admittance case granted. Displaced Persons Act of 1948, Pub. L. No. 80-774, § 4, 62 Stat. 1009, 1011 (repealed 1952); Refugee Relief Act of 1953, Pub. L. No. 83-203, § 6, 67 Stat. 400, 403 (expired Dec. 31, 1956); Immigration and Nationality Act amendments, Pub. L. No. 89-236, § 3, 79 Stat. 911, 912, 914 (1965) (codified as amended at 8 U.S.C. § 1153 (1982)). Unlike the former acts, however, if the Attorney General did not terminate the conditional entry status within two years, the alien was returned to I.N.S. custody for reevaluation. *Id.* If a special inquiry officer found the alien admissible after reevaluation, the alien could then adjust her immigration status to that of permanent residence. *Id.*

43. Immigration and Nationality Act amendments, Pub. L. No. 94-571, § 4, 90 Stat. 2703, 2705 (1976) (codified as amended at 8 U.S.C. § 1153 (1982)).

44. 124 CONG. REC. 21,426 (1978) (statement of Mr. Fish).

45. REFUGEE RESETTLEMENT PROGRAMS, *supra* note 11, at 6.

46. See *supra* note 40 and accompanying text. This still had the practical effect of completely limiting section 203(a)(7)'s application to the Communist region of the Western Hemisphere (Cuba).

47. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

incorporated the 1951 United Nations Convention Relating to the Status of Refugees.⁴⁸ The United Nations' definition of a refugee⁴⁹ and non-refoulement⁵⁰ provisions were incorporated into the Protocol. Congress thought it would be possible to comply with the terms of the Protocol without amending the Immigration and Nationality Act.⁵¹ However section 203(a)(7) proved to be an inadequate vehicle for the implementation of the United Nations standards.⁵² This inadequacy was "demonstrated by . . . continued reliance on the parole provision to assist refugees ineligible for conditional entry."⁵³

Senator Edward Kennedy, in a letter to Secretary of State Cyrus Vance and others, noted the "urgent need . . . to establish a long range refugee policy [that would] treat all refugees fairly and assist all refugees equally."⁵⁴ This letter was one of the catalysts for legislative change that finally resulted in the Refugee Act of 1980.⁵⁵

The Senate report accompanying the Senate refugee bill stated the bill's objective of repealing the immigration laws' "discriminatory treatment of refugees."⁵⁶ The bill eliminated section 203(a)(7) and its

48. *Id.*; Convention Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 137.

49. The United Nations Convention defines a refugee as:

[any person who,] owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or . . . unwilling to return to it.

Convention Relating to the Status of Refugees, Jan. 31, 1967, art. 1(A)(2), 19 U.S.T. 6259, 6261, T.I.A.S. No. 6577, at 39, 189 U.N.T.S. 137, 152. For the United Nations construction of the refugee definition see OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS, para. 80-83, U.N. Doc. HCR/IP/4, U.N. Sales No. E.79.II.1 (1979) [hereinafter U.N. HANDBOOK](selected portions provided in attached appendix).

50. The United Nation's nonrefoulement provision provides: "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Convention Relating to the Status of Refugees, Jan. 31, 1967, art. 33, 19 U.S.T. 6259, 6276, T.I.A.S. No. 6577, at 54, 189 U.N.T.S. 137, 176.

51. REFUGEE RESETTLEMENT PROGRAMS, *supra* note 11, at 7.

52. *Id.*

53. Refugee Act of 1979: Hearings on H.R. 2816 Before the Subcommittee on Immigration, Refugees, and International Law of the Committee on the Judiciary, 96th Cong., 1st Sess. (1979) (statement of Attorney General Griffin Bell).

54. S. REP. NO. 256, 96th Cong., 1st Sess. 2-3 (1979).

55. *Id.*

56. *Id.* at 15.

geographical and ideological restrictions,⁵⁷ adopted the non-discriminatory United Nations definition of "refugee" and raised annual regular refugee admittance from 17,400 to 50,000.⁵⁸

The Senate bill would have required the Attorney General to promulgate a uniform asylum application procedure⁵⁹ with the proviso that "[a]sylum *shall* be granted if the alien is a refugee" within the United Nations definition and "his deportation or return is prohibited under section 243(h)."⁶⁰ Congress took these measures in order to bring United States law into conformity with the United Nations Protocol and Convention by providing a uniform asylum procedure.⁶¹

Twelve years after the ratification of the United Nations Protocol, the Refugee Act of 1980 established the first separate asylum provision. The asylum provision was based on the United Nations definition of a refugee.⁶² Unlike the Senate bill, the Refugee Act's asylum provision reads, "the alien *may* be granted asylum in the discretion of the Attorney General" if he finds the alien is a refugee within the United Nations definition.⁶³ Withholding of deportation became mandatory in the 1980 Act.⁶⁴ Mandatory non-refoulement was consistent with prior bills⁶⁵ and the United Nations Protocol Relating to the Status of Refugees.⁶⁶

III. THE NINTH CIRCUIT COURT OF APPEALS' REVIEW OF WITHHOLDING OF DEPORTATION AND ASYLUM CASES

The Ninth Circuit Court of Appeals' review of the Board of Immigration Appeals' (BIA) withholding of deportation (withholding) and asylum cases is at times intrusive and at times deferential. Two

57. *Id.* at 1-2.

58. *Id.* at 1, 15.

59. *Id.* at 16.

60. *Id.* (emphasis added).

61. S. REP. NO. 590, 96th Cong., 2d Sess. 19, 20 (1980); H.R. REP. NO. 781, 96th Cong., 2d Sess. 19, 20 (1980).

62. 8 U.S.C. § 1158(a) (1982). The Attorney General could adjust the status of up to 5,000 of all refugees admitted under section 207(a). 8 U.S.C. § 1159(b) (1982). See appendix for the United Nations construction of the "refugee" definition.

63. 8 U.S.C. § 1158(a) (1982) (emphasis added).

64. 8 U.S.C. § 1243(h)(1) (1982).

65. S. REP. NO. 590, 96th Cong., 2d Sess. 20 (1980); H.R. REP. NO. 781, 96th Cong., 2d Sess. 20 (1980); see *supra* note 41 and accompanying text.

66. See *supra* note 50 and accompanying text. The Refugee Act also shortened the period to adjust immigration status from two years to one year. 8 U.S.C. § 1159(b)(2) (1982).

cases, *Bolanos-Hernandez v. I.N.S.*⁶⁷ and *Diaz-Escobar v. I.N.S.*,⁶⁸ and their progeny, are representative of this dichotomy. For analytical clarity, the different Ninth Circuit standards of review will be labelled "lines of authority." The first line of authority, as represented by *Bolanos-Hernandez* and its progeny, looks directly to the Refugee Act and the United Nations Protocol to review the BIA's withholding and asylum standards.⁶⁹ The second line of authority, represented by *Diaz-Escobar* and its progeny, gives great deference to the BIA's applications of the Refugee Act's standards.⁷⁰

The following exposition will illustrate the relationship between cases involving withholding of deportation and asylum and indicate how different levels of judicial review affect this relationship. The *Bolanos-Hernandez* line of authority tends to first analyze withholding of deportation. It then concludes that if the standard for withholding is satisfied, then a fortiori, the asylum standard has also been satisfied.⁷¹ In contrast, the *Diaz-Escobar* line of authority tends to first analyze asylum by stating the same proposition in the negative: if petitioner has not satisfied their asylum burden, then a fortiori, petitioner has not satisfied their withholding of deportation burden.⁷² Consequently, the first line's withholding of deportation standard is discussed prior to the more deferential second line of authority's asylum analysis.

In order to subsequently evaluate the impact of the United States Supreme Court's *I.N.S. v. Cardoza-Fonseca* decision upon the Ninth Circuit's Refugee Act construction, the following discussion represents the Ninth Circuit state of the law in the window of time between the Supreme Court's first Refugee Act decision, *I.N.S. v. Stevic*,⁷³ and *I.N.S. v. Cardoza-Fonseca*.⁷⁴ The *Cardoza-Fonseca* decision will then

67. *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277 (9th Cir. 1984).

68. *Diaz-Escobar v. I.N.S.*, 782 F.2d 1488 (9th Cir. 1986).

69. *Bolanos-Hernandez*, 767 F.2d 1277; see also *Cardoza-Fonseca v. I.N.S.*, 767 F.2d 1448 (9th Cir. 1985); *Hernandez-Ortiz v. I.N.S.*, 777 F.2d 509 (9th Cir. 1985).

70. *Diaz-Escobar*, 782 F.2d 1488; see also *Rebollo-Jovel v. I.N.S.*, 794 F.2d 441 (9th Cir. 1986).

71. *Bolanos-Hernandez*, 767 F.2d 1277; *Cardoza-Fonseca*, 767 F.2d 1448; *Hernandez-Ortiz*, 777 F.2d 509.

72. *Diaz-Escobar*, 782 F.2d 1488; *Rebollo-Jovel*, 794 F.2d 441. Because the *Bolanos-Hernandez* line of cases primarily analyzes withholding of deportation while the *Diaz-Escobar* line is primarily concerned with asylum, it may seem like the following analysis compares apples and oranges. Actually, the distinction between the asylum and withholding of deportation standards is so tenuous that it is difficult to understand one without reference to the other.

73. 467 U.S. 407 (1984).

74. 107 S. Ct. 1207 (1987).

be discussed in the context of the Ninth Circuit's interpretation of the Refugee Act to determine what impact the decision will have upon the previously existing state of asylum and withholding of deportation cases in the Ninth Circuit.

A. The Ninth Circuit Court of Appeals' Construction of the Refugee Act of 1980

1. First Line of Authority—*Bolanos-Hernandez* and Its Progeny
 - a. Withholding of Deportation

The Refugee Act's provision governing withholding of deportation provides: "The Attorney General *shall not* deport or return any aliens . . . to a country, if the Attorney General determines that such alien's life or freedom would be threatened in such a country on account of race, religion, nationality, membership in a particular social group or political opinion."⁷⁵ To obtain withholding of deportation it is necessary to satisfy four requirements:

1. A likelihood of persecution; i.e., a threat to life or freedom.
2. Persecution by the government or by a group which the government is unable to control.
3. Persecution resulting from petitioner's political beliefs.
4. The petitioner is not a danger or security risk to the United States."⁷⁶

75. 8 U.S.C. § 1253(h) (1982). All requests for asylum are also considered to be requests for withholding of deportation under Immigration and Nationality Act section 243(h). 8 C.F.R. § 208.3(b) (1987). When a claimant submits Immigration and Naturalization Service Form I-589 to apply for asylum, the district director is required to request an advisory opinion on the claim from the State Department. 8 C.F.R. §§ 208.7, 208.10(b) (1987).

The Ninth Circuit Court of Appeals noted in *Chatila v. I.N.S.*, 770 F.2d 786 (9th Cir. 1985), that the adverse advisory opinion is clearly persuasive. *Id.* at 790. While the BIA disregarded the affirmative State Department advisory letter for Zavala-Bonillo, the Ninth Circuit found it to be significant. *Zavala-Bonillo v. I.N.S.*, 730 F.2d 562, 567 n.6 (9th Cir. 1984).

In the above two cases the court suggested that advisory letters are persuasive authority whose weight is contingent upon the credibility of the witness and evidence. An alien has the opportunity to rebut an advisory letter by presenting evidence to the contrary. An Immigration Judge, on the other hand, can only rebut an affirmative State Department finding by impeaching the alien's credibility.

It is interesting to note that these form letters, even when requested to comment on section 243(h), only address the discretionary "well-founded fear" standard. See Preston, *Asylum Adjudication: Do State Department Advisory Opinions Violate Refugee's Rights and U.S. International Obligations?*, 45 MD. L. REV. 91 (1986).

76. *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1284 (9th Cir. 1984); *accord* *Zepeda-Melendez v. I.N.S.*, 741 F.2d 285, 289 (9th Cir. 1984); *McMullen v. I.N.S.*, 658 F.2d 1312, 1315 (9th Cir. 1981).

The term "likelihood of persecution," for purposes of withholding, means that it is "more likely than not" that persecution will occur,⁷⁷ i.e., a greater than fifty percent chance of persecution.⁷⁸ To establish that persecution is more likely to occur than not, evidence of general violence in a country is insufficient.⁷⁹ The alien, or others "similarly situated," must be "at a greater risk than the general population."⁸⁰ Additionally, the threat must be serious.⁸¹ Because "[a]uthentic refugees rarely are able to offer direct corroboration of specific threats," the court eliminated the requirement for corroborative evidence in establishing serious threats.⁸² Testimony, if credible, persuasive, and specific, will satisfy the serious threat requirement.⁸³

Both withholding of deportation and political asylum requires a showing that persecution is on account of political opinion.⁸⁴ For persecution to be on account of political opinion, it is not necessary for the refugee to take sides in a conflict.⁸⁵ To require such political affiliation would frustrate the Refugee Act's objective of providing "protection to all victims of persecution regardless of ideology."⁸⁶ Neutrality itself is considered a political opinion.⁸⁷ If a persecutor believes that his victim maintains a particular political opinion, and persecutes on that account, the opinion is effectively imputed to the victim:⁸⁸ "it is irrelevant whether a victim actually possesses any of these opinions."⁸⁹ This is known as imputed political opinion.

77. *I.N.S. v. Stevic*, 467 U.S. 407, 429 (1984).

78. *Cardoza-Fonseca v. I.N.S.*, 767 F.2d 1448, 1452 (9th Cir. 1985).

79. *Bolanos-Hernandez*, 767 F.2d at 1284; *accord Zepeda-Melendez*, 741 F.2d at 290; *Cardoza-Fonseca*, 767 F.2d at 1452.

80. *Cardoza-Fonseca*, 767 F.2d at 1452 (citing *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1284 (9th Cir. 1984)).

81. *Id.* (citing *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1285 (9th Cir. 1984)).

82. *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1285 (9th Cir. 1984).

83. *Id.* See *Cardoza-Fonseca v. I.N.S.*, 767 F.2d 1448, 1453 (9th Cir. 1985). Such uncorroborated testimony, according to the first line of authority, will also apply to the well-founded fear standard. *Id.*

84. In addition to political opinion, asylum is available to people who have a "well-founded fear of persecution on account of race, religion, nationality, [and] membership in a particular social group . . ." 8 U.S.C. § 1101(a)(42)(A) (1982).

85. *Bolanos-Hernandez*, 767 F.2d at 1286; *Hernandez-Ortiz v. I.N.S.*, 777 F.2d 509, 517 (9th Cir. 1985); cf. *Rebollo-Jovel v. I.N.S.*, 794 F.2d 441, 447 (9th Cir. 1986).

86. *Bolanos-Hernandez*, 767 F.2d at 1286.

87. *Id.* at 1287.

88. *Id.* at 1286; *Argueta v. I.N.S.*, 759 F.2d 1395, 1397 (9th Cir. 1985) (refusal to join one side in a dispute constitutes a political opinion); *Del Valle v. I.N.S.*, 730 F.2d 1414 (9th Cir. 1985).

89. *Hernandez-Ortiz*, 777 F.2d at 517 (courts may examine the persecutor's motivation for acting to evaluate whether persecution was on account of political opinion).

Petitioner in *Bolanos-Hernandez* testified that his brother was forced to fight with guerilla troops and that several of his friends were killed after refusing requests to join guerrilla forces.⁹⁰ The court, in addition to petitioner's testimony, considered as evidence newspaper articles concerning general violence in El Salvador, and violent retribution for both refusing to join guerrilla groups and airing political views.⁹¹ Bolanos-Hernandez, by refusing to join the guerrillas, had a likelihood that he would be persecuted on the basis of his political opinion by a group the government was unable to control. Therefore, he was entitled to withholding of deportation.⁹²

In *Argueta v. I.N.S.*,⁹³ Argueta testified that he was threatened by "death squad" members who believed he belonged to a political group.⁹⁴ He believed that the same men who threatened him had tortured and killed his brother-in-law.⁹⁵ This testimony sufficiently established imputed political opinion.⁹⁶ The Ninth Circuit Court of Appeals reversed the BIA denial of withholding of deportation and asylum, holding that, if Argueta's testimony was credible, he was entitled to relief.⁹⁷

Petitioner in *Aviles-Torres v. I.N.S.*⁹⁸ sought review of the BIA's denial of his request to reopen his withholding of deportation and asylum case.⁹⁹ Aviles-Torres submitted new evidence which included a Salvadoran newspaper article which described him as a guerrilla and documentary reports by human rights groups on males who refused military service in El Salvador.¹⁰⁰ The court found that the article, combined with refusing military service, made Aviles-Torres a "prime target" for persecution and warranted "a hearing if not an outright grant of relief."¹⁰¹

In the above three cases, the court did not require extensive evidence corroborating the allegations of persecution. Petitioner's own testimony formed the primary evidentiary basis in both *Bolanos-Her-*

90. *Bolanos-Hernandez*, 767 F.2d at 1286.

91. *Id.* at 1280.

92. *Id.* at 1287-88.

93. *Argueta v. I.N.S.*, 759 F.2d 1395 (9th Cir. 1985).

94. *Id.*

95. *Id.* at 1396.

96. *Id.* at 1397; *cf. Zayas-Marini v. I.N.S.*, 785 F.2d 801, 804 (9th Cir. 1986).

97. *Id.* at 1397.

98. *Aviles-Torres v. I.N.S.*, 790 F.2d 1433 (9th Cir. 1986).

99. *Id.*

100. *Id.* at 1434-35.

101. *Id.* at 1436.

nandez and *Argueta*. Their testimony contained allegations of threats by parties which had the ability to carry out their threats. By contrast, this evidence would probably have been insufficient for the second line of authority to find that the petitioners had satisfied even the less stringent asylum standard.

b. Asylum

An alien can obtain asylum in the United States if the Attorney General, in his discretion, determines that such alien is a refugee within the meaning of the Refugee Act.¹⁰² The Refugee Act defines a refugee as: "any person who is outside any country of such person's nationality . . . and is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."¹⁰³

While withholding is mandatory, granting asylum is discretionary. "Persecution" must be based upon a "well founded fear," which is defined as "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regard[ed] as offensive."¹⁰⁴ The "well-founded fear" standard has both an objective and subjective component. The objective component requires credible, direct, and specific evidence to support a finding that the fear is reasonable.¹⁰⁵ The subjective component requires that the fear be genuinely held.¹⁰⁶ Unlike withholding of deportation, asylum claims can have a

102. 8 U.S.C. § 1158(a) (1982).

103. 8 U.S.C. § 1101(a)(42)(A) (1982). This commonly is referred to as the "well-founded fear" standard.

104. *Kovac v. I.N.S.*, 407 F.2d 102, 107 (9th Cir. 1969); *accord Cardoza-Fonseca v. I.N.S.*, 767 F.2d 1448, 1452 (9th Cir. 1985); *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1283 n.13 (9th Cir. 1984); *Hernandez-Ortiz v. I.N.S.*, 777 F.2d 509, 516 (9th Cir. 1985) (" 'Persecution' occurs only when there is a difference between the persecutor's views or status and that of the victim. . . ."). While no bright line exists to determine the degree of persecution required for a grant of relief, there does not seem to be a single case that distinguishes between the term persecution as applied to asylum as opposed to withholding of deportation. See Comment, *The Need for a Codified Definition of "Persecution" in the United States Refugee Law*, 39 STAN. L. REV. 187 (1986); see also *infra* note 182.

105. *Diaz-Escobar v. I.N.S.*, 782 F.2d 1488, 1492 (9th Cir. 1986). In *Cardoza-Fonseca*, the Ninth Circuit was guided by the Seventh Circuit standard for well-founded fear. 767 F.2d at 1453 (citing *Carvajal-Munoz v. I.N.S.*, 743 F.2d 562, 574 (7th Cir. 1984)).

106. *Bolanos-Hernandez*, 767 F.2d at 1283. "[A] desire" to avoid a situation entailing the risk of persecution "may be enough" to satisfy the well-founded fear test." *Id.* at n.11 (quoting *Stevic v. Sava*, 678 F.2d 401, 406 (2d Cir. 1982) (citing U.N. HANDBOOK, *supra* note 49) (selected portions reprinted in the appendix); see also *Cardoza-Fonseca*, 767 F.2d at 1452; *Diaz-Escobar v. I.N.S.*, 782 F.2d at 1492; *Rebollo-Jovel v. I.N.S.*, 794 F.2d 441, 443 (9th Cir. 1986).

less than fifty percent likelihood of persecution to be successful.¹⁰⁷

In *I.N.S. v. Stevic*, the United States Supreme Court, in dicta, stated that the standard for granting asylum is "more generous" than the standard for withholding of deportation.¹⁰⁸ The Court further differentiated the two standards by noting that the term "refugee" was absent from the language of the withholding provision.¹⁰⁹ This is significant because, by definition, to be within the Refugee Act's asylum provision one must be a "refugee."¹¹⁰ Judge Reinhardt, in *Bolanos-Hernandez*, found this interpretation to be consistent with Congressional intent.¹¹¹ Withholding of deportation is more difficult to obtain because relief is mandatory upon an objective showing that the alien *would be* persecuted.¹¹² Because withholding of deportation has more stringent requirements than asylum, if the withholding burden is satisfied, then the alien, a fortiori, qualifies for asylum.¹¹³

In *I.N.S. v. Stevic* the Supreme Court, while specifically reserving further consideration of the asylum issue, stated that whether the applicant "would be persecuted" is the standard for withholding of deportation.¹¹⁴ After the *Stevic* decision the Board of Immigration Appeals (BIA) applied a "would be persecuted" withholding of deportation standard to Arguella-Salguera's asylum claim.¹¹⁵ The Ninth Circuit Court of Appeals subsequently reversed and remanded the case because the BIA admitted to applying one standard to both claims.¹¹⁶

Subsequent to the *I.N.S. v. Stevic* decision, the BIA has applied the "would be" standard to other asylum claims while asserting that two standards have been applied.¹¹⁷ This is significant because the

107. *Cardoza-Fonseca*, 767 F.2d at 1452-53.

108. *I.N.S. v. Stevic*, 467 U.S. 407, 425 (1984).

109. *Id.* at 424.

110. 8 U.S.C. § 1158(a) (1982); *see also* 8 U.S.C. § 1101(a)(42)(A) (1982).

111. *Cardoza-Fonseca*, 767 F.2d at 1283.

112. *Stevic*, 467 U.S. at 422.

113. *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1283 (9th Cir. 1984); *accord* *Del Valle v. I.N.S.*, 776 F.2d 1407, 1411 (9th Cir. 1985); *Canjura-Flores v. I.N.S.*, 784 F.2d 885 (9th Cir. 1985); *Damaize-Job v. I.N.S.*, 787 F.2d 1332, 1339 (9th Cir. 1986). *Cf.* *Diaz-Escobar v. I.N.S.*, 782 F.2d 1489, 1491 (9th Cir. 1986); *Rebollo-Jovel v. I.N.S.*, 794 F.2d 441, 443 (9th Cir. 1986). Once it is established that an alien qualifies for asylum it is still within the Attorney General's discretion to grant or deny asylum. *I.N.S. v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1208 (1987).

114. *I.N.S. v. Stevic*, 467 U.S. 407, 422 (1984).

115. *Cardoza-Fonseca v. I.N.S.*, 767 F.2d 1448, 1454 (9th Cir. 1985). Arguella-Salguera's claim was consolidated with *Cardoza-Fonseca*'s in the Ninth Circuit. *Id.* at 1450.

116. *Id.* Both the Immigration Judge and the BIA held that the withholding and asylum standards were the same. *Id.*

117. *See infra* text accompanying notes 148-58.

Supreme Court in *Stevic* stated, in dicta, that the asylum standard is more generous than the withholding of deportation standard.

2. The Second Line of Authority—Asylum under *Diaz-Escobar*

Petitioner in *Diaz-Escobar v. I.N.S.* was a Guatemalan who left his country after he received a letter threatening that he would “‘be subject to the consequences’” if he remained in the country.¹¹⁸ He was unable to produce the letter, and had no idea from whom it came, but maintained that he feared retribution due to his political neutrality. Petitioner’s testimony concerning the letter was considered credible and was unrefuted by the Immigration Judge and the BIA.¹¹⁹ The Ninth Circuit additionally found that the conditions in Guatemala indirectly corroborated the letter’s existence, that the “magnitude” of the threat was serious and that there was a likelihood that the sender “might” act upon their threat.¹²⁰ Because the origin of the letter was unknown, the BIA found that petitioner’s fear was not well-founded.¹²¹

The court agreed with the BIA that “Diaz-Escobar’s evidence [did] not establish a reasonable expectation of persecution.”¹²² The court declined to either grant withholding of deportation or to remand the case for discretionary review of the asylum claim. While the court expressed doubt as to whether the threat was politically motivated, it did not reach this issue because the court found the evidence insufficient to establish the objective fear component of the well-founded fear standard.¹²³

Diaz-Escobar cut-back on the scope of evidence as testimony established in *Bolanos-Hernandez* and its progeny. In *Diaz-Escobar*, the court stated that while credible, unrefuted and indirectly corroborated testimony deserved serious consideration,¹²⁴ to permit such testimony to satisfy an alien’s burden of proof would approximate de

118. *Diaz-Escobar v. I.N.S.*, 782 F.2d at 1489, 1490 (9th Cir. 1985) (citing *I.N.S. v. Stevic*, 467 U.S. 407, 424 n.19 (1984)). In *Stevic* the Supreme Court assumed without deciding that asylum is “more generous” than the withholding standard. *Stevic*, 467 U.S. at 425. The *Stevic* Court did not further refine the relationship between the two standards.

119. *Diaz-Escobar*, 782 F.2d at 1493.

120. *Id.*

121. *Id.* at 1490.

122. *Id.* at 1493.

123. *Id.* at 1494.

124. *Id.* at 1492.

novo review.¹²⁵ This directly conflicts with *Bolanos-Hernandez* where the court reasoned that "[i]f the alien's own testimony about a threat, when unrefuted and credible, were [sic] insufficient to establish the fact that the threat was made, it would be close to impossible for [any political refugee] to make out a section 243(h) case."¹²⁶ Acknowledging that simply establishing that an alien was threatened does not satisfy their statutory burden, the court in *Bolanos-Hernandez* reasoned that such establishment may hinge on whether the threat was serious and issued from a party which had the capacity to carry it out.¹²⁷

Credibility was not a disputed matter in *Diaz-Escobar*. The court nonetheless hesitated to permit testimony alone to satisfy the threshold burden of establishing an objective fear of persecution. The court found that both the magnitude of the threat was serious and that the potential threat could be carried out was indirectly corroborated by the conditions in Guatemala.¹²⁸ These findings do not focus on the subjective mind of the petitioner, but rather on the objective circumstances that created Diaz-Escobar's fear of persecution. If petitioner had an objective fear, which the court's findings suggest, it then becomes necessary to analyze whether petitioner's fear was on account of one of the five statutory grounds.¹²⁹

The court's reasoning analytically departed from the *Bolanos-Hernandez* progeny at this point. Diaz-Escobar maintained that while he did not know who had sent him the threatening letter, he believed that he would be persecuted on the basis of his political neutrality. The *Diaz-Escobar* court stated that a politically neutral alien must prove that the threat of persecution exists on account of his or her political neutrality.¹³⁰ This holding negates the doctrine of im-

125. *Id.* The court suggests that it would be unreasonable to require the Immigration and Naturalization Service to rebut an alien's testimony. *Id.*

126. *Bolanos-Hernandez*, 767 F.2d 1277, 1285 (9th Cir. 1984) (quoting *McMullen v. I.N.S.*, 658 F.2d 1312, 1319 (9th Cir. 1969) (citing U.N. HANDBOOK, *supra* note 49, para. 196, at 47 (1979)). The court further noted that "[p]ersecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution." *Bolanos-Hernandez*, 767 F.2d at 1285.

127. *Id.*

128. *Diaz-Escobar v. I.N.S.*, 782 F.2d 1489, 1494 (9th Cir. 1986).

129. The five statutory categories of persecution which qualify an alien as a refugee are "persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A) (1982).

130. *Diaz-Escobar*, 782 F.2d at 1493-94; *cf.* *Hernandez-Ortiz v. I.N.S.*, 777 F.2d 509, 517 (9th Cir. 1985) ("[I]t is irrelevant whether a victim actually possesses any of these opinions as long as the [persecutor] believes that he does.").

puted political opinion established in *Bolanos-Hernandez*.¹³¹ The court in *Hernandez-Ortiz v. I.N.S.* reasoned that "it is irrelevant whether a victim actually possesses any of [the opinions for which they are persecuted] as long as the [persecutor] believes he does."¹³² The *Bolanos-Hernandez* line of cases focuses on the subjective belief of the persecutor and not on the actual belief of the victim.¹³³

If petitioner's unrefuted testimony is sufficient to establish a serious objective threat under *Bolanos-Hernandez* then Diaz-Escobar's showing, in light of the corroborating conditions in Guatemala, should have been sufficient to establish this threshold burden. The court next should have inquired into the statutory grounds for relief. It is perhaps here that Diaz-Escobar would have been unable to obtain relief because he did not know the origin of the letter. While the petitioner could not demonstrate that the letter was from a party who wished him harm because of any political opinion, the court incorrectly reasoned that if they were to reach the political opinion question, the relevant inquiry would focus on petitioner's political neutrality and not on the political opinion that may have been imputed to the petitioner.

In addition to interpreting the requirements for establishing political opinion differently than the first line of authority, the *Diaz-Escobar* court and its progeny heightened the alien's evidentiary burden. The *Diaz-Escobar* court cited *I.N.S. v. Stevic* for the proposition that to justify asylum a "showing *may* be slightly less than a clear probability standard."¹³⁴ By July of 1986, the "may be" language of *Diaz-Escobar* had become mandatory. The court in *Rebollo-Jovel v. I.N.S.*,¹³⁵ stated that the asylum "standard *requires* slightly less than a

131. *Bolanos-Hernandez*, 767 F.2d at 1286-87.

132. *Hernandez-Ortiz*, 777 F.2d at 517 (citing *Argueta v. I.N.S.*, 759 F.2d 1395, 1397 (9th Cir. 1985); U.N. HANDBOOK, *supra* note 49, para. 80-83, at 7).

133. *Hernandez-Ortiz*, 777 F.2d at 516. The court's reasoning in *Diaz-Escobar* implies that an alien may only be considered a refugee if he or she was persecuted for his or her actual, not imputed, beliefs. *Diaz-Escobar v. I.N.S.*, 782 F.2d 1489, 1494 (9th Cir. 1986). This would exclude all others who are the victim of persecution as a result of an imputed political opinion.

For example, if an alien had an outspoken record as an individual rights advocate, and was persecuted by the government because the alien was believed to be a communist, a court could use the *Diaz-Escobar* dicta to deny asylum. Asylum would then be denied because persecution was not on account of individual rights activity. If the alien was persecuted for being a member of a political group to which he or she was not a member relief could then be denied because the alien's own beliefs were not the basis of the persecution.

134. *Diaz-Escobar*, 782 F.2d at 1492 (citing *I.N.S. v. Stevic*, 467 U.S. 407, 424 (1984)) (emphasis added).

135. *Rebollo-Jovel v. I.N.S.*, 794 F.2d 441 (9th Cir. 1986).

showing that persecution is 'more likely than not'" to occur.¹³⁶ This shift in language effectively raised the alien's burden of proof for asylum to a level commensurate with withholding of deportation.

In *Rebollo-Jovel v. I.N.S.*, the court found that unless the BIA's language clearly means something other than what it purports to be, the BIA decision should be affirmed.¹³⁷ Another part of the majority opinion, however, acknowledges that the BIA does not regard the asylum and withholding standards "to be meaningfully different."¹³⁸

Rebollo-Jovel left El Salvador after he received a threatening telephone call and two threatening letters. His uncle, the former Minister of Education of El Salvador, was murdered by extremists in 1979. Two of his cousins had also recently been killed. He was interrogated by three individuals disguised as policemen who "told him 'not to get involved' in matters that were none of his business."¹³⁹ The letters and telephone call contained substantially the same warning.¹⁴⁰ Because Rebollo-Jovel did not establish that the threats were from a political group or on account of his political neutrality, the court did not find them politically motivated.¹⁴¹ The BIA's decision was, therefore, affirmed.¹⁴²

Judge Canby, writing separately in *Rebollo-Jovel*, concurred on the withholding of deportation issue but dissented on the asylum claim.¹⁴³ The dissent points out that the BIA had recently concluded that "the standards for asylum and withholding of deportation are not meaningfully different and, in practical application, converge."¹⁴⁴ If the BIA is obliged to apply two standards and yet concedes that the standards in practice converge, then the court "gives presumptive effect"¹⁴⁵ to the Board's invocation of "magic words"¹⁴⁶ by affirming the Board's purported application of two standards. Because Rebollo-Jovel had a colorable asylum claim, the dissent would have required the BIA to analyze his claim under the more lenient asylum

136. *Id.* at 443 (emphasis added) (citing *Diaz-Escobar v. I.N.S.*, 782 F.2d 1489, 1492 (9th Cir. 1986)).

137. *Rebollo-Jovel*, 794 F.2d at 447.

138. *Id.* at 444 (quoting *Matter of Acosta*, Interim Dec. 2986 (BIA Mar. 1, 1985)).

139. *Rebollo-Jovel*, 794 F.2d at 447.

140. *Id.*

141. *Id.* at 448.

142. *Id.*

143. *Id.* (Canby, J., dissenting).

144. *Id.* at 449 (quoting *Matter of Acosta*, Interim Dec. 2986 (BIA Mar. 1, 1985)).

145. *Rebollo-Jovel v. I.N.S.*, 794 F.2d 441, 449 (9th Cir. 1986).

146. *Vides-Vides v. I.N.S.*, 783 F.2d 1463, 1468 (9th Cir. 1986).

standard.¹⁴⁷

The Ninth Circuit in *Florez De Solis v. I.N.S.*¹⁴⁸ was faced with the "would be" persecuted language being applied to an asylum claim.¹⁴⁹ The court found this choice of words to be "unfortunate" but not dispositive.¹⁵⁰ In *Vides-Vides v. I.N.S.*¹⁵¹ the court reasoned that "the BIA's decision read as a whole, reflects its recognition, although not necessarily adoption, of distinctive standards which could be relevant" in distinguishing asylum from withholding of deportation.¹⁵² While *Vides-Vides* provided insufficient evidence to establish a well-founded fear of persecution, the court's analysis encourages the BIA to simply acknowledge, and not apply, separate asylum and withholding of deportation standards. The result of this encouragement was unmasked in *Martinez-Sanchez v. I.N.S.*¹⁵³

In *Martinez-Sanchez*, Judge Canby's majority opinion looked to the evidence in the record and not the language employed by the BIA.¹⁵⁴ The BIA had, the court concluded, applied a single standard to both the asylum and withholding claims.¹⁵⁵ The BIA attempted to show two standards had been applied by stating that their "conclusion is the same regardless of whether his claim is assessed in terms of a 'clear probability,' 'good reason,' or 'realistic likelihood' standard of persecution."¹⁵⁶ This attempt failed, however, because the BIA cited three cases which held the two standards to be practically identical.¹⁵⁷ Because the BIA did not apply a less stringent standard to *Martinez-Sanchez's* colorable asylum claim, the court reversed the administrative decision.¹⁵⁸

147. *Rebollo-Jovel*, 794 F.2d at 449.

148. *Florez-De Solis v. I.N.S.*, 796 F.2d 330, 334 (9th Cir. 1986).

149. *Id.*

150. *Id.*

151. *Vides-Vides*, 783 F.2d at 1468.

152. *Id.*

153. *Martinez-Sanchez v. I.N.S.*, 794 F.2d 1396 (9th Cir. 1986).

154. *Id.* at 1398; *see also* *Garcia-Ramos v. I.N.S.*, 775 F.2d 1370 (9th Cir. 1985) (the court declined withholding of deportation but remanded the asylum claim because if the petitioner's testimony was credible a well-founded fear had been established).

155. *Martinez-Sanchez*, 794 F.2d 1396.

156. *Id.* at 1399.

157. *Id.* at 1398 (quoting *Matter of Martinez-Romero*, 18 I & N Dec. 72 (BIA 1981), *aff'd*, 692 F.2d 595 (9th Cir. 1982)) (citing *Rejaie v. I.N.S.*, 691 F.2d 139 (3d Cir. 1982)); *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982); *Matter of Martinez-Romero*, 18 I & N Dec. 72 (BIA 1981) *aff'd*, 692 F.2d 595 (9th Cir. 1982).

158. *Martinez-Sanchez*, 794 F.2d at 1399 (the court remanded the case to the BIA to avoid deciding the case de novo). Interestingly almost every case discussed in this section has concerned Latin American aliens. This is no coincidence. A 1986 General Accounting Office

IV. SUMMARY, THE SUPREME COURT'S REVIEW AND THE NON-DELEGATION DOCTRINE

A. *An Overview of United States Refugee Law: The Need for Reform*

The United States' refugee policy between World War II and 1980 was formulated through a series of ad hoc and short term statutes. Both the Displaced Persons Act¹⁵⁹ and the Refugee Relief Act¹⁶⁰ were of narrow numerical and geographic application. The 1952 Immigration and Naturalization Act contained a stringent and discretionary withholding of deportation provision.¹⁶¹ The 1965 amendment to the Immigration and Nationality Act of 1952 liberalized admissions requirements, broadened geographic restrictions and withdrew the physical persecution requirement from the withholding of deportation provision.¹⁶²

The geographical and ideological restrictions of section 203(a)(7) of the Immigration and Naturalization Act, while less discriminatory than previous provisions, were too narrow to meet the United States' international obligations under the United Nations Protocol.¹⁶³ This resulted in the government's continued and anomalous reliance on parole.¹⁶⁴ The House and Senate reports preceding the Refugee Act's enactment reveal an awareness of 203(a)(7)'s inadequacies.¹⁶⁵

The Refugee Act of 1980 set out a policy which is consistent with the United Nations Protocol Relating to the Status of Refugees.¹⁶⁶ The Refugee Act abolished the geographic and numerical restrictions of section 203(a)(7), withholding of deportation became mandatory

(GAO) study concluded that while 66% of Iranian applicants were granted asylum only 2% of Salvadoran applicants were successful. When torture, imprisonment and arrest were factors in the asylum determination, the GAO study concluded that 4% of Salvadorans were granted asylum as compared with 80% of Polish applicants. L.A. Times, Oct. 22, 1986, Part I, at 4, col. 3.

159. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (repealed 1952); see *supra* notes 8-16 and accompanying text.

160. Refugee Relief Act of 1953, Pub. L. No. 83-203, 67 Stat. 400 (expired Dec. 31, 1956); see *supra* notes 17-21 and accompanying text.

161. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101-1557 (1982)); see *supra* notes 25-27 and accompanying text.

162. Immigration and Nationality Act amendments, Pub. L. No. 89-236, 79 Stat. 911 (1965) (codified as amended in scattered sections of 8 U.S.C.); see *supra* notes 38-46 and accompanying text.

163. REFUGEE RESETTLEMENT PROGRAMS, *supra* note 11, at 8.

164. See *supra* notes 35-37 and accompanying text.

165. *Id.*

166. See *supra* notes 56-66 and accompanying text.

upon establishing the requisite elements, and a new separate asylum provision was added to United States statutory law.¹⁶⁷ While the Attorney General formerly used parole to bypass the restrictive immigration structure,¹⁶⁸ the Refugee Act now provides a legitimate vehicle for regular refugee admittance which is not based on geographic regions. This brought United States statutory law into conformity with the United Nations Protocol Relating to the Status of Refugees.¹⁶⁹

The improvement in the statutory refugee law of the United States is only valuable to the extent that the Immigration and Naturalization Service, and the administrative and federal courts, implement the statutory goals. Different interpretations of the Refugee Act's mandate, as discussed previously, have arisen. Within the Ninth Circuit, the distinction between withholding of deportation and asylum is unclear.

Two different lines of authority have emerged from the Ninth Circuit's review of BIA decisions. The first line looks to the Refugee Act itself to determine if the BIA is interpreting the law consistent with the United Nations Protocol. The second line of authority presumes BIA decisions are forthright and grants great deference to BIA findings. The following chart summarizes the areas of greatest divergence between the two lines of authority.

Topic	Line One	Line Two
I. Asylum (well-founded fear)	less than fifty percent chance of persecution required. ¹⁷⁰	slightly less than the withholding burden of "more likely than not" required. ¹⁷¹

167. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.); *see supra* notes 63-65 and accompanying text.

168. *See supra* notes 35-37 and accompanying text.

169. S. REP. NO. 590, 96th Cong., 2d Sess. 19, 20 (1980); H.R. REP. NO. 781, 96th Cong., 2d Sess. 19, 20 (1980).

170. *Cardoza-Fonseca v. I.N.S.*, 767 F.2d 1448, 1452 (9th Cir. 1985).

171. *Rebollo-Jovel v. I.N.S.*, 794 F.2d 441, 443 (9th Cir. 1986) (Canby, J., dissenting).

II.		
Political opinion	Persecution is on account of political opinion if the persecutor thinks the alien possesses a particular view. ¹⁷²	Persecution is on account of political opinion if the individual actually possesses such an opinion. ¹⁷³
Policy	The purpose of the Refugee Act would be frustrated if a refugee was forced to take sides. ¹⁷⁴	The Refugee Act only protects individuals if there is a likelihood or fear of persecution on account of their actual "political opinion" or one of the four other statutory grounds. ¹⁷⁵
III.		
Testimony as evidence	If an alien's testimony is credible and unrefuted, corroborative evidence is unnecessary to establish an asylum or withholding claim. ¹⁷⁶	Credible, unrefuted, and indirectly corroborated testimony is insufficient to establish an asylum or withholding claim. ¹⁷⁷
Policy	There would be an unreasonable burden on the alien to require largely unavailable documentation. ¹⁷⁸	If would approximate de novo review to reverse the BIA when the alien's evidence consists of their own undocumented testimony. ¹⁷⁹

B. *I.N.S. v. Cardoza-Fonseca*

On March 9, 1987, the United States Supreme Court decided *I.N.S. v. Cardoza-Fonseca*.¹⁸⁰ The Court granted certiorari to determine the relationship between the standards for asylum and withholding of deportation.¹⁸¹ In holding the asylum and the withholding of deportation standards to be different, the Court looked to "the plain language of the Act, its symmetry with the United Nations Protocol, and its legislative history"¹⁸²

172. *Hernandez-Ortiz v. I.N.S.*, 777 F.2d 509, 517 (9th Cir. 1985); see U.N. HANDBOOK, *supra* note 49, para. 80-83 (selected portions reprinted in appendix).

173. *Diaz-Escobar v. I.N.S.*, 782 F.2d 1488, 1493, 1494 (9th Cir. 1986); see *supra* notes 130-133 and accompanying text.

174. *Bolanos-Hernandez v. I.N.S.*, 767 F.2d 1277, 1286 (9th Cir. 1984).

175. *Diaz-Escobar*, 782 F.2d at 1494.

176. *Bolanos-Hernandez*, 767 F.2d at 1285; see U.N. HANDBOOK para. 196 at 47, *supra* note 49.

177. *Diaz-Escobar*, 782 F.2d at 1492.

178. *Bolanos-Hernandez*, 767 F.2d at 1285.

179. *Diaz-Escobar*, 782 F.2d at 1492.

180. *I.N.S. v. Cardoza-Fonseca*, 107 S. Ct. 1207 (1987) (Powell, J., dissenting).

181. *Id.* At the time the Court heard the case only the Third Circuit Court of Appeals agreed with the government's contention that the two standards were identical.

182. *Id.* at 1222. The Court stated that even if an alien only had a 10% chance of persecu-

1. The Plain Language of the Refugee Act

The plain language of the Refugee Act's withholding of deportation provision is "would be persecuted."¹⁸³ The words "would be" impose objective criteria for withholding of deportation determinations.¹⁸⁴ The term "well-founded fear" in the section 208(a) asylum provision, on the other hand, requires an inquiry into the mental state of the potential refugee.¹⁸⁵ Section 208(a)'s subjective component, is also apparent from the plain language of the term "fear" in the statute: "[t]his ordinary and obvious meaning of the phrase is not to be lightly discounted."¹⁸⁶ In construing statutes, the Court presumed that the legislature expressed their intent in the plain language of the statute.¹⁸⁷

The Court found it significant that "Congress simultaneously drafted section 208(a) and amended section 243(h)."¹⁸⁸ This evidenced a conscious choice to create two distinct standards. Further rejecting the government's statutory interpretation, the Court stated that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."¹⁸⁹ As the government's construction of the statute was contrary to the statute's plain language, the Court could have affirmed the Ninth Circuit Court of Appeals on this ground alone.

2. The Refugee Act's Legislative History and Symmetry with the United Nations Protocol

The Court noted that the legislative history of the Refugee Act clearly indicated Congressional intent to conform United States law with the United Nations Protocol.¹⁹⁰ The Refugee Act's definition of

tion he or she could be considered to possess a "well-founded fear" of persecution within the United Nations' definition. *See id.* at 1217.

183. 8 U.S.C. § 1253(h) (1982).

184. *Cardoza-Fonseca*, 107 S. Ct. at 1212.

185. *Id.*

186. *Id.* at 1213 (citing *Russello v. United States*, 464 U.S. 16, 21 (1983) and *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 198-199 (1976)).

187. *Id.*

188. *Id.*

189. *Id.* at 1221 (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 & n.9 (1984)).

190. *Id.* "The Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform. It has been widely considered useful in giving content to

a "refugee," the standard by which asylum eligibility is measured,¹⁹¹ is almost identical to that of the definition in the United Nations Protocol.¹⁹²

Article 34 of the United Nations Protocol provides that "contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. . . ."¹⁹³ This is the substantial equivalent of section 208(a) because the "as far as possible" language gives signatory countries discretionary freedom over refugee admittance. This principle is embodied in section 208(a), which gives the Attorney General discretion to determine refugee eligibility.¹⁹⁴

As stated above, the Senate bill drafted the Act's asylum provision in mandatory terms.¹⁹⁵ The actual Refugee Act followed the House's discretionary version of section 208(a).¹⁹⁶ The Court interpreted Congressional adoption of the House version as expressing an intent not to "restrict eligibility for asylum only to aliens meeting the stricter standard."¹⁹⁷ The mandatory nature of withholding of deportation perhaps explains why withholding, which offers only temporary relief, requires a higher burden than the discretionary asylum, which affords greater protection.

If both standards were mandatory, the INS could have confused them in such a way as to apply the more stringent "would be" standard to asylum determinations. This unfortunately occurred despite statutory attempts to avoid having the stricter withholding standard apply to asylum.

The Court was guided by the *Office of the United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status* when interpreting the meaning of the term "refugee."¹⁹⁸ While the Court was cautious not to imply that the *Handbook* was binding on the Immigration and Naturalization Service, it found that "the *Handbook* provide[d] significant guidance

the obligations that the Protocol establishes." *Id.* at 1217 n.22 (citing *McMullen v. I.N.S.*, 658 F.2d 1312, 1319 (9th Cir. 1981)).

191. See *supra* note 103 and accompanying text.

192. *I.N.S. v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1218 (1987); cf. *supra* notes 49 and 103 and accompanying text.

193. *Cardoza-Fonseca*, 107 S. Ct. at 1218.

194. See *supra* notes 102-104 and accompanying text.

195. See *supra* note 60 and accompanying text.

196. 8 U.S.C. § 1158(a) (1982).

197. *Cardoza-Fonseca*, 107 S. Ct. at 1219.

198. *Id.* at 1217 & n.22.

in construing the Protocol, to which Congress sought to conform."¹⁹⁹

3. Practical Result of the Majority Opinion

Justice Blackmun's concurring opinion clearly identified the weakness in the majority opinion.²⁰⁰ The majority, while suggesting alternative sources to interpret the mandate of section 208(a), did not "attempt to give substance to the term 'well-founded fear' and leaves that task to the 'process of case-by-case adjudication' by the INS"²⁰¹ Justice Blackmun wrote separately to emphasize the need to follow the guidance of the circuit courts and legal scholars who have grappled in earnest with interpreting the meaning of the well-founded fear standard. This is especially necessary in light of the "purposeful blindness [demonstrated] by the INS, which only now begins its task of developing the standard entrusted to its care."²⁰²

As illustrated by the Ninth Circuit's experience, Congressional failure to provide guidelines with which to interpret the Refugee Act has caused the judiciary to send inconsistent messages to both the administrative courts and the INS. Despite the fact that the Ninth Circuit was applying two standards, there was a conspicuous lack of consistency in their application. The two lines of authority are now only guided by dicta as the Court's majority holding is limited to merely stating that the two standards are different.

If *I.N.S. v. Cardoza-Fonseca* is to have any effect beyond overruling the Third Circuit's²⁰³ application of one standard to both asylum and withholding of deportation, the INS, BIA, and circuit courts must apply the suggestions the Court offers in dicta. Although the Court did not specify a particular well-founded fear interpretation, the Court did suggest following the guidance of the circuit courts, legal scholars who have extensively written on the topic, and the United Nations' *Handbook*.²⁰⁴ The experience of the Ninth Circuit demonstrates not only a high degree of refinement but also a great

199. *Id.*

200. *Id.* at 1222-23 (Blackmun, J., concurring).

201. *Id.* at 1223.

202. *Id.*

203. At the time that *I.N.S. v. Cardoza-Fonseca* was decided only the Third Circuit Court of Appeals interpreted the withholding of deportation and asylum provisions to be the same. *Id.* at 1215 & n.2.

204. The United Nations' *Handbook* provides a clause by clause analysis of the refugee definition (selected portions reprinted in the Appendix). Unless there is some affirmative attempt to follow the Court's dicta, the Ninth Circuit will be entirely unaffected by the holding in this case. The sole victor will have been Luz Marina Cardoza-Fonseca.

deal of inconsistency. In order to see what role the federal courts will play in refining the "well-founded fear" standard, it is useful to briefly review the Court's past and present role in shaping administrative decisions.

4. The Majority Opinion's Impact on the Scope of Judicial Review over Administrative Decisions

The Court, by applying "traditional tools of statutory construction," may have extended the federal courts' power of review over administrative decisions farther than it has existed in many years.²⁰⁵ Consequently, a brief survey of intrusive judicial review over agencies is necessary.

a. The Non-delegation Doctrine Past and Present

The New Deal era saw the rise and extensive use of the administrative agency.²⁰⁶ In response to constitutional problems with delegated authority, the Court developed the non-delegation doctrine. The doctrine prohibits Congressional delegations of power where the legislature attempts to abdicate its duty to legislate.

Perhaps the most famous articulation of the doctrine was by Justice Hughes in his majority opinion in *Schechter Poultry Corp. v. United States*.²⁰⁷ Justice Hughes stated that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is . . . vested."²⁰⁸ One year after *Schechter*, the Court in *Carter v. Carter Coal Co.*²⁰⁹ struck down the Bituminous Coal Conservation Act of 1935 on the grounds that it was not within Congress' Commerce Clause power.²¹⁰ While *Carter Coal* was not a delegation case, the Court relied on the principle articulated in *Schechter* that the federal government cannot act without a constitutional basis for the power being exercised.²¹¹

Professor Gunther noted that the "*Carter* decision confirmed [the Roosevelt administration's] . . . worst anticipations generated by *Schechter*."²¹² Roosevelt responded by attempting to "pack" the

205. *Cardoza-Fonseca*, 107 S. Ct. at 1223-24 (Scalia, J., concurring).

206. K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2-13 to -14 (1984).

207. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

208. *Id.* at 529; see *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

209. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

210. *Id.*

211. *Id.*

212. G. GUNTHER, CONSTITUTIONAL LAW 129 (11th ed. 1985).

Supreme Court with extra Justices. While the plan did not succeed, the Court abandoned its intrusive review over Congressional regulations in the economic sphere.²¹³ This caused President Roosevelt to believe that he had ultimately prevailed in his conflict with the Court.²¹⁴

While the intrusive judicial review of *Schechter and Carter Coal* has not been actively utilized since President Roosevelt's "Court-packing" attempt, then Associate Justice Rehnquist has recently begun a partial revival. In *National Cable Television Association v. United States*,²¹⁵ the Court reviewed a delegation of power by Congress to the National Cable Television Association ("Association").²¹⁶ The enabling legislation permitted the Association to be financially independent from Congress by raising its own resources.²¹⁷ Congress intended the Association to be able "to fully support all its activities so the taxpayers [would] not be required to bear any part of the load"²¹⁸ The issue resolved by the Court was whether this revenue-generating function was a tax or a fee.²¹⁹ While the Constitution grants Congress great latitude in the exercise of taxing power, only Congress has the power to tax.²²⁰ If Congress vested the Association with taxing power, it would have transferred an essential legislative function in violation of the non-delegation principle.²²¹ The Court felt it necessary to point out the potential non-delegation problem. However, because the Court concluded that the revenue was a fee, there was no need to resolve the non-delegation issue.²²²

In *Industrial Union Department v. American Petrol Institute*,²²³ Justice Rehnquist's concurrence stated that the non-delegation doctrine was not guilty of the judicial activism of the substantive due process of the 1930's.²²⁴ The issue in *Industrial Union* was whether Congress' delegation to the Occupational Safety and Health Adminis-

213. *Id.*

214. *Id.* at 128-30.

215. *National Cable Television Ass'n*, 415 U.S. 336 (1974).

216. *Id.* at 336.

217. *Id.* at 337.

218. *Id.* at 339 (citing H.R. CONF. REP. NO. 91-649, at 6).

219. *National Cable Television Ass'n*, 415 U.S. at 340-41.

220. *Id.*

221. *Id.*

222. *Id.* at 342.

223. *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring).

224. *Id.* at 675.

tration of the power to determine what constitutes a "safe" benzene level for the workplace was a standardless or permissible delegation. Justice Rehnquist concluded it was sufficiently standardless to be prohibited by the non-delegation doctrine because the legislature failed to provide any information from which a meaningful standard could be developed.²²⁵

Justice Rehnquist's dissenting opinion in *American Textile Manufacturers. v. Donovan*²²⁶ reviewed the same benzene provision. The dissent concluded that Congress had "unconstitutionally delegated to the Executive Branch the authority to make the 'hard policy choices' properly the task of the legislature."²²⁷

Justice Douglas' opinion in *National Cable Television* was qualitatively different than Justice Rehnquist's decisions in the above two benzene cases. While the benzene cases dealt with a highly specialized area that required particular expertise in the field, *National Cable Television* focused on the transfer of the fundamental Congressional power to tax. Justice Rehnquist's application of the non-delegation doctrine to the above type of delegation ignores the fact that this type of broad delegation, especially in technical areas, has become commonplace in late-twentieth century American government.²²⁸ More importantly, Congress has neither the time nor expertise to specifically regulate in areas requiring special expertise.

Professor Davis, in his treatise on administrative law, suggests that if the non-delegation doctrine is to have any application today it will have to be modified. Professor Davis suggests following some creative state court examples.²²⁹ These state cases share a common

225. *Id.* at 611, 688.

226. *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981).

227. *Id.* at 543 (Rehnquist, J., dissenting) (quoting *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 671 (1980) (Rehnquist J., concurring)).

228. See *infra* note 229 and accompanying text.

229. K. DAVIS, *supra* note 206, § 3:1-2 (Supp. 1982); cf. Comment, *The Fourth Branch: Reviving the Nondelegation Doctrine*, 4 B.Y.U. L. REV. 619 (1984). This comment proposes the following analytical framework based on United States Supreme Court holdings and dicta, for a modern revival of the non-delegation doctrine:

- (1) A heavy presumption should exist in favor of popularly elected representatives of the people making important policy decisions.
- (2) The factors weighing against delegation of power must be balanced against the need for and benefits to be gained by delegation.
 - (a) Factors weighing against delegation include:
 - (1) the subject matter has been constitutionally committed to Congress;
 - (2) the subject matter is resistant to the formulation of manageable governing standards;
 - (3) precise and meaningful standards are absent;

principle: for a broad delegation to be tolerable there must be some type of safeguard—judicial, procedural, or inherent in the language of the statute.²³⁰

The proposed modification of the non-delegation doctrine is actually a restatement of the corporate doctrine of *ultra vires*.²³¹ This results because broad delegations are to be tolerated if sufficient safeguards exist to prevent an agency from wielding power beyond that which Congress has intended to delegate. In this manner judicial review protects the Congressional intent behind a delegation of power. Judicial review also protects continued Congressional confidence in making broad delegations because the courts provide a mechanism to check administrative abuse.

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- (4) existing standards are vague or general;
 - (5) the delegation involves constitutionally protected freedoms, or criminal sanctions;
 - (6) Congress has failed to make basic policy decisions before delegating or the delegation does not reflect a policy decision that Congress has made; and
 - (7) the policy decision to be made is relatively important.
 - (b) Factors weighing in favor of delegation include:
 - (1) there is an expressed need for delegation;
 - (2) delegation would achieve specific benefits;
 - (3) the issues are complex;
 - (4) the decision requires technological or industrial expertise;
 - (5) policy determinations are not necessary to the decision;
 - (6) the issues are related to foreign relations, trade, or commerce;
 - (7) the delegation involves merely ascertaining whether and when conduct falls within a previously established, well-defined statute; and
 - (8) the delegation involves only execution or enforcement responsibilities pursuant to a previously established statute.

All of these factors are not necessarily entitled to equal weight but must be carefully considered in light of the presumption against delegation and the facts and circumstances of each case that indicate a special need for delegation. A framework such as the one proposed here may discourage irresponsible delegation of congressional authority, promote more efficient legislative government, and ensure proper guidelines when Congress does choose to delegate.

Id. at 640-41.

230. K. DAVIS, *supra* note 206, § 3:15; *Adams v. North Carolina Dep't of Natural and Economic Resources*, 295 N.C. 683, 698, 249 S.E.2d 402, 411 (1978) ("the presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards."); *State v. Dep't of Indus., Labor and Human Relations*, 77 Wis. 2d 126, 135, 252 N.W.2d 353, 357 (1977) ("broad grants of legislative power will be permitted where there are procedural and judicial safeguards. . . ."); *Myer v. Lord*, 37 Or. App. 59, 65, 586 P.2d 367, 371 (1978) ("The existence of *standards* is relevant in assessing the validity of delegation, but the existence of *safeguards* for those whose interest may be affected is determinative." (emphasis in original)).

231. While "*ultra vires*" is a term that is properly used in the context of a corporation acting beyond the scope of its corporate charter, the principle is the same: if there are sufficient safeguards an administrative agency will not be able to exercise power beyond that which Congress has delegated.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²³² the United States Supreme Court acknowledged that Congress could not only delegate policy-making authority, but agencies may "properly rely upon the incumbent administration's views of wise policy to inform its judgments."²³³ The exercise of this policy-making authority, however, is tempered by the legislative intent behind the enabling statute. Thus, in *Natural Resources Defense Council v. Herrington*,²³⁴ the District of Columbia Court of Appeals, quoting the United States Supreme Court, stated that "[w]hen an agency does not reasonably accommodate the policies of a statute or reaches a decision that is 'not one that Congress would have sanctioned' a reviewing court *must* intervene to enforce the policy decisions made by Congress."²³⁵ The Court in *I.N.S. v. Cardoza-Fonseca* noted that:

[i]f one thing is clear from the legislative history of the new definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees²³⁶

The above quote from *Herrington* construes the broad powers of an administrative agency articulated in *Chevron, U.S.A.*, and tempered by the restrictions stated in *United States v. Shimer*.²³⁷ In *Shimer*, the Court implied that a reviewing court has the power to overrule administrative decisions contrary to a statute or its legislative history. Further, if an administrative agency's interpretation of the statute "is not one that Congress would have sanctioned," then a reviewing court may enforce the legislature's policy choice.²³⁸ Justice Stevens also utilized *Shimer* and *Chevron U.S.A.* to support the Court's holding.²³⁹ Because the government's interpretation of the well-founded fear standard was contrary to Congressional intent to conform United States law to the Protocol, it was declared invalid.²⁴⁰

232. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

233. *Id.* at 865.

234. *Natural Resources Defense Council v. Herrington*, 768 F.2d 1355 (D.C. Cir. 1985).

235. *Id.* at 1383 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961) (emphasis added)).

236. *I.N.S. v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1216 (citing the 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267).

237. *United States v. Shimer*, 367 U.S. 374 (1961).

238. *Id.* at 382-83.

239. *Cardoza-Fonseca*, 107 S. Ct. at 1220-21 nn.29-30.

240. *Id.*

This position is consistent with Professor Davis' notion of a modified non-delegation doctrine.²⁴¹ If reviewing courts are given the flexibility to intervene in administrative decisions that are contrary to Congressional intent, agencies will be forced to be more responsible in their statutory construction. Prior to *I.N.S. v. Cardoza-Fonseca* it was unclear whether a reviewing court could take this position. The impact of the majority opinion on administrative law will be profound. Courts are now armed with the tools to look beyond the language of a statute and look to the legislative intent in construing an administrative agency's mandate. The unanswered question is: will this usher in a new era of judicial activism or constructively cut back on the previously unchecked administrative abuses that occur in some agencies?

V. CONCLUSION AND PROPOSAL

Because the United States Supreme Court, in *I.N.S. v. Cardoza-Fonseca*, held that Congress clearly intended to conform United States refugee law to the United Nations Protocol, it would violate Congressional policy for the BIA to apply a standard inconsistent with the Protocol. Additionally, a reviewing court can only determine if the BIA is acting within the scope of its delegated authority by examining whether the BIA is acting consistently with the United Nations Protocol.

It is important to remember that the previous discussion of the Ninth Circuit Court of Appeal's review of withholding of deportation and asylum assumed that the two standards were different. Despite this difference, two lines of authority arose: one giving presumptive effect to BIA decisions and the other looking to the United Nations Protocol for guidance. Unless the United States Supreme Court's reliance on *United States v. Shimer* obligates courts to enforce BIA conformity with the Protocol, the *I.N.S. v. Cardoza-Fonseca* decision will have only a *de minimis* impact.²⁴²

An additional problem is determining what the United Nations Protocol *actually* mandates. In 1979, the Office of the United Nations High Commissioner for Refugees published its *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*.²⁴³

241. See *supra* note 230 and accompanying text.

242. The Third Circuit Court of Appeals, however, was the only circuit to apply the two standards the same even after *I.N.S. v. Stevic*.

243. U.N. HANDBOOK, *supra* note 49 (selected portions reprinted in the Appendix).

In light of the need to apply the Refugee Act consistently with the Protocol, the United Nations' *Handbook* is invaluable. The *Handbook* contains a provision-by-provision analysis of each clause in the "refugee" definition.²⁴⁴

By officially adopting the *Handbook*, Congress could take a significant move towards insuring that its intent behind the Refugee Act is implemented. This would provide greater consistency in interpreting the Protocol and form a concrete basis for implementing the Refugee Act's stated purpose: "to provide comprehensive and uniform provisions for the effective resettlement and absorption of . . . refugees"²⁴⁵

If Congress fails to adopt the *Handbook*, the judiciary will still be in a position to review BIA decisions consistent with a modified non-delegation doctrine. By refusing to give presumptive effect to BIA decisions, the courts can provide the necessary safeguard to prevent the BIA from acting in a manner that Congress would not approve.

There is an extreme danger, however, in leaving the future implementation of the Refugee Act exclusively to the administrative branch and the federal courts. Difficulty in interpreting the Refugee Act has been an ongoing problem since the Act's conception. There is nothing to suggest that the Supreme Court's *I.N.S. v. Cardoza-Fonseca* decision will bring uniformity in construing the definition of "refugee." Quite to the contrary, the opinion gives little guidance and opens the door wide to a new era of judicial "legislation."

Because the Ninth Circuit Court of Appeals has consistently distinguished between asylum and withholding of deportation cases in its review of BIA decisions, the *I.N.S. v. Cardoza-Fonseca* decision will have no effect on the continued divergence between the various case lines discussed above. Therefore, it is essential that the United Nations' *Handbook* be officially adopted to insure that Congressional intent is implemented and the United States, as a signatory to the Protocol, meets its obligations under international law.

*Richard R. Silver**

244. *Id.*

245. 8 U.S.C. § 1101(b) (1982).

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APPENDIX*

OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER
FOR REFUGEES Handbook On Procedures And Criteria For De-
termining Refugee Status Under the 1951 Convention and the 1967
Protocol Relating to the Status of Refugees

Geneva, September 1979

CRITERIA FOR THE DETERMINATION OF REFUGEE STATUS

CHAPTER I

GENERAL PRINCIPLES

28. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

29. Determination of refugee status is a process which takes place in two stages. Firstly, it is necessary to ascertain the relevant facts of the case. Secondly, the definitions in the 1951 Convention and the 1967 Protocol have to be applied to the facts thus ascertained.

30. The provisions of the 1951 Convention defining who is a refugee consist of three parts, which have been termed respectively "inclusion", "cessation" and "exclusion" clauses.

31. The inclusion clauses define the criteria that a person must satisfy in order to be a refugee. They form the positive basis upon which the determination of refugee status is made. The so-called cessation and exclusion clauses have a negative significance; the former indicate the conditions under which a refugee ceases to be refugee and the latter enumerate the circumstances in which a person is excluded from the application of the 1951 Convention although meeting the positive criteria of the inclusion clauses.

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CHAPTER II INCLUSION CLAUSES

A. Definitions

(1) Statutory Refugees

32. Article 1 A(1) of the 1951 Convention deals with statutory refugees, i.e. persons considered to be refugees under the provisions of international instruments preceding the Convention. This provision states that:

“For the purposes of the present Convention, the term refugee’ shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization; Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugees being accorded to persons who fulfil the conditions of paragraph 2 of this section.”

33. The above enumeration is given in order to provide a link with the past and to ensure the continuity of international protection of refugees who became the concern of the international community at various earlier period. As already indicated (para. 4 above), these instruments have by now lost much of their significance, and a discussion of them here would be of little practical value. However, a person who has been considered a refugee under the terms of any of these instruments is automatically a refugee under the 1951 Convention. Thus, a holder of a so-called “Nansen Passport” or a “Certificate of Eligibility” issued by the International Refugee Organization must be considered a refugee under the 1951 Convention unless one of the cessation clauses has become applicable to his case or he is excluded from the application of the Convention by one of the exclusion clauses. This also applies to a surviving child of a statutory refugee.

(2) General Definition in the 1951 Convention

34. According to Article 1 A(2) of the 1951 Convention the term “refugee” shall apply to any person who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or,

owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

This general definition is discussed in detail below.

....

B. Interpretation of terms

....

(2) "well founded fear of being persecuted"

(a) General analysis

37. The phrase "well-founded fear of being persecuted" is the key phrase of the definition. It reflects the views of its authors as to the main elements of refugee character. It replaces the earlier method of defining refugees by categories (i.e. persons of a certain origin not enjoying the protection of their country) by the general concept of "fear" for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his country of origin.

38. To the element of fear—a state of mind and a subjective condition—is added the qualification "well-founded". This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term "well-founded fear" therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration.

39. It may be assumed that, unless he seeks adventure or just wishes to see the world, a person would not normally abandon his home and country without some compelling reason. There may be many reasons that are compelling and understandable, but only one motive has been singled out to denote a refugee. The expression "owing to well-founded fear of being persecuted"—for the reasons stated—by indicating a specific motive automatically makes all other reasons for escape irrelevant to the definition. It rules out such persons as victims of famine or natural disaster, unless they also have well-founded fear

of persecution for one of the reasons stated. Such other motives may not, however, be altogether irrelevant to the process of determining refugee status, since all the circumstances need to be taken into account for a proper understanding of the applicant's case.

40. An evaluation of the *subjective element* is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions. One person may have strong political or religious convictions, the disregard of which would make his life intolerable; another may have no such strong convictions. One person may make an impulsive decision to escape; another may carefully plan his departure.

41. Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, his membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences—in other words, everything that may serve to indicate that the predominant motive for his application is fear. Fear must be reasonable. Exaggerated fear, however, may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified.

42. As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgment on conditions in the applicant's country of origin. The applicant's statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin—while not a primary objective—is an important element in assessing the applicant's credibility. In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there.

43. These considerations need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded. The laws of the coun-

try of origin, and particularly the manner in which they are applied, will be relevant. The situation of each person must, however, be assessed on its own merits. In the case of a well-known personality, the possibility of persecution may be greater than in the case of a person in obscurity. All these factors, e.g. a person's character, his background, his influence, his wealth or his outspokenness, may lead to the conclusion that his fear of persecution is "well-founded".

44. While refugee status must normally be determined on an individual basis, situations have also arisen in which entire groups have been displaced under circumstances indicating that members of the group could be considered individually as refugees. In such situations the need to provide assistance is often extremely urgent and it may not be possible for purely practical reasons to carry out an individual determination of refugee status for each member of the group. Recourse has therefore been had to so-called "group determination" of refugee status, whereby each member of the group is regarded *prima facie* (i.e. in the absence of evidence to the contrary) as a refugee.

45. Apart from the situations of the type referred to in the preceding paragraph, an applicant for refugee status must normally show good reason why he individually fears persecution. It may be assumed that a person has well-founded fear of being persecuted if he has already been the victim of persecution for one of the reasons enumerated in the 1951 Convention. However, the word "fear" refers not only to persons who have actually been persecuted, but also to those who wish to avoid a situation entailing the risk of persecution.

46. The expressions "fear of persecution" or even "persecution" are usually foreign to a refugee's normal vocabulary. A refugee will indeed only rarely invoke "fear of persecution" in these terms, though it will often be implicit in his story. Again, while a refugee may have very definite opinions for which he has had to suffer, he may not, for psychological reasons, be able to describe his experiences and situation in political terms.

47. A typical test of the well-foundedness of fear will arise when an applicant is in possession of a valid national passport. It has sometimes been claimed that possession of a passport signifies that the issuing authorities do not intend to persecute the holder, for otherwise they would not have issued a passport to him. Though this may be true in some cases, many persons have used a legal exit from their country as the only means of escape without ever having revealed

their political opinions, knowledge of which might place them in a dangerous situation vis-a-vis the authorities.

48. Possession of a passport cannot therefore always be considered as evidence of loyalty on the part of the holder, or as an indication of the absence of fear. A passport may even be issued to a person who is undesired in his country of origin, with the sole purpose of securing his departure, and there may also be cases where a passport has been obtained surreptitiously. In conclusion, therefore, the mere possession of a valid national passport is no bar to refugee status.

49. If, on the other hand, an applicant, without good reason, insists on retaining a valid passport of a country of whose protection he is allegedly unwilling to avail himself, this may cast doubt on the validity of his claim to have "well-founded fear". Once recognized, a refugee should not normally retain his national passport.

50. There may, however, be exceptional situations in which a person fulfilling the criteria of refugee status may retain his national passport—or be issued with a new one by the authorities of his countries of origin under special arrangements. Particularly where such arrangements do not imply that the holder of the national passport is free to return to his country without prior permission, they may not be incompatible with refugee status.

(b) Persecution

51. There is no universally accepted definition of "persecution", and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution.

52. Whether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made in the preceding paragraphs. The subjective character of fear of persecution requires an evaluation of the opinions and feelings of the person concerned. It is also in the light of such opinions and feelings that any actual or anticipated measures against him must necessarily be viewed. Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.

53. In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factor (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on "cumulative grounds". Needless to say, it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context.

. . . .

- (3) "for reasons of race, religion, nationality, membership of a particular social group or political opinion"

(a) General analysis

66. In order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons stated above. It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them. Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his case to such an extent as to identify the reasons in detail.

67. It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 Convention is met with in this respect. It is evident that the reasons for persecution under these various headings will frequently overlap. Usually there will be more than one element combined in one person, e.g. a political opponent who belongs to a religious or national group, or both, and the combination of such reasons in his person may be relevant in evaluating his well-founded fear.

(b) Race

68. Race, in the present connexion, has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as "races" in common usage. Frequently it will also entail membership of a specific social group of common descent forming a minority

within a larger population. Discrimination for reasons of race has found world-wide condemnation as one of the most striking violations of human rights. Racial discrimination, therefore, represents an important element in determining the existence of persecution.

69. Discrimination on racial grounds will frequently amount to persecution in the sense of the 1951 Convention. This will be the case if, as a result of racial discrimination, a person's human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights, or where the disregard of racial barriers is subject to serious consequences.

70. The mere fact of belonging to a certain racial group will normally not be enough to substantiate a claim of refugee status. There may, however, be situations where, due to particular circumstances affecting the group, such membership will in itself be sufficient ground to fear persecution.

(c) Religion

71. The Universal Declaration of Human Rights and the Human Rights Covenant proclaim the right to freedom of thought, conscience and religion, which right includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance.

72. Persecution for "reasons of religion" may assume various forms, e.g. prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practice their religion or belong to a particular religious community.

73. Mere membership of a particular religious community will normally not be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground.

(d) Nationality

74. The term "nationality" in this context is not to be understood only as "citizenship". It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term "race". Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority

and in certain circumstances the fact of belonging to such a minority may in itself give rise to well founded fear of persecution.

75. The co-existence within the boundaries of a State of two or more national (ethnic, linguistic) groups may create situations of conflict and also situations of persecution or danger of persecution. It may not always be easy to distinguish between persecution for reasons of nationality and persecution for reasons of political opinion when a conflict between national groups is combined with political movements, particularly where a political movement is identified with a specific "nationality".

76. Whereas in most cases persecution for reasons of nationality is feared by persons belonging to a national minority, there have been many cases in various continents where a person belonging to a majority group may fear persecution by a dominant minority.

(e) Membership of a particular social group

77. A "particular social group" normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear persecution on other grounds, i.e. race, religion or nationality.

78. Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.

79. Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.

(f) Political opinion

80. Holding political opinions different from those of the Government is not in itself a ground for claiming refugee status, and an applicant must show that he has a fear of persecution for holding such opinions. This presupposes that the applicant holds opinions not tolerated by the authorities, which are critical of their policies or methods. It also presupposes that such opinions have come to the notice of the authorities or are attributed by them to the applicant. The political opinions of a teacher or writer may be more manifest than those

of a person in a less exposed position. The relative importance or tenacity of the applicant's opinions—in so far as this can be established from all the circumstances of the case—will also be relevant.

81. While the definition speaks of persecution “for reasons of political opinion” it may not always be possible to establish a causal link between the opinion expressed and the related measures suffered or feared by the applicant. Such measures have only rarely been based expressly on “opinion”. More frequently, such measures take the form of sanctions for alleged criminal acts against the ruling power. It will, therefore, be necessary to establish the applicant's political opinion, which is at the root of his behaviour, and the fact that it has led or may lead to the persecution that he claims to fear.

82. As indicated above, persecution “for reasons of political opinion” implies that an applicant holds an opinion that either has been expressed or has come to the attention of the authorities. There may, however, also be situations in which the applicant has not given any expression to his opinions. Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reasons of political opinion.

83. An applicant claiming fear of persecution because of political opinion need not show that the authorities of his country of origin knew of his opinions before he left the country. He may have concealed his political opinion and never have suffered any discrimination or persecution. However, the mere fact of refusing to avail himself of the protection of his Government, or a refusal to return, may disclose the applicant's true state of mind and give rise to fear of persecution. In such circumstances the test of well-founded fear would be based on an assessment of the consequences that an applicant having certain political dispositions would have to face if he returned. This applies particularly to the so-called refugee “sur place.” (footnote omitted)

84. Where a person is subject to prosecution or punishment for a political offence, a distinction may have to be drawn according to whether the prosecution is for political *opinion* or for politically-motivated *acts*. If the prosecution pertains to a punishable act committed out of political motives, and if the anticipated punishment is in conformity with the general law of the country concerned, fear of such prosecution will not in itself make the applicant a refugee.

85. Whether a political offender can also be considered a refugee will depend upon various other factors. Prosecution for an offence may, depending upon the circumstances, be a pretext for punishing the offender for his political opinions or the expression thereof. Again, there may be reason to believe that a political offender would be exposed to excessive or arbitrary punishment for the alleged offence. Such excessive or arbitrary punishment will amount to persecution.

86. In determining whether a political offender can be considered a refugee, regard should also be had to the following elements: personality of the applicant, his political opinion, the motive behind the act, the nature of the act committed, the nature of the prosecution and its motives; finally, also, the nature of the law on which the prosecution is based. These elements may go to show that the person concerned has a fear of persecution and not merely a fear of prosecution and punishment—within the law—for an act committed by him.

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